Tamilarasan a/l Subramaniam v Timbalan Menteri Dalam Negeri, Malaysia & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(HC)-11–01 OF 2021(B)
ABDUL RAHMAN SEBLI, ZABARIAH MOHD AND HASNAH HASHIM FCJJ
15 SEPTEMBER 2021

Criminal Procedure — Habeas corpus — Minister ordered appellant to be detained for two years under s 6(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act') — Appellant applied for writ of habeas corpus claiming police investigating officer ('IO') 'delayed' submitting investigation report to Inquiry Officer of Home Ministry and to Minister under s 3(3) of Act — Act did not prescribe timeframe for IO or Inquiry Officer to submit their respective reports to Minister — Whether both IO and Inquiry Officer could submit their respective reports to Minister at any time within the 60-day period appellant was allowed to be detained for under s 3(2) of Act — Whether detention would only be illegal if appellant was detained for more than 60 days under s 3(2) without any detention order under s 6(1) being made — Whether appellant's challenge to defects in IO's investigation process was irrelevant and misplaced because his detention under s 3(2) had been superseded by detention order under s 6(1) — Whether appellant's challenge should be rightly be directed at whether there was any procedural non-compliance with issuance of the s 6(1) detention order — Whether Advisory Board under Act was not obliged to issue subpoenas at detainee's request to secure attendance of witnesses at his representation hearing — Whether it was entirely detainee's responsibility to make available the witnesses he wished to examine at the hearing

Pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'), the first respondent ordered the appellant to be detained for two years at the second respondent's rehabilitation centre. The appellant applied for a writ of habeas corpus to be released from detention but the application was dismissed by the High Court. In his instant appeal against that decision, the appellant advanced two grounds: (a) that he was prejudiced by the 36-day 'delay' on the part of the police investigating officer ('IO') in submitting his investigation report to the Inquiry Officer of the Home Affairs Ministry and to the Minister as required by s 3(3) of the Act; and (b) that the Advisory Board's refusal of his request to issue subpoenas to secure the attendance of witnesses at his representation hearing had caused him grave injustice. The appellant was arrested and detained by police under s 3(1) of the Act on 1 March 2020. Subject to certain conditions, s 3(2) allowed him to be detained for a period of 60 days if no detention order under s 6(1) had been made against

him. The appellant contended that the IO had submitted his investigation report to the Inquiry Officer and to the Minister only on 6 April 2020, ie, 36 days after 1 March 2020 and that 'delay' had caused the first respondent to 'delay' making his detention order under s 6(1).

Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) Nothing in the Act prescribed the time-frame within which the IO was to commence his investigation after the detainee's arrest under s 3(1) and for the Inquiry Officer to commence his Inquiry under s 5(2) after receiving the investigation report from the IO. And both ss 3(3) and 5(4) of the Act required the respective officers to submit their respective reports 'within such period as may be prescribed by the Minister by regulations made under this Act'. But no such period was prescribed by the Minister (see paras 13 & 16–17).

(2) The proper way to construe ss 3(3) and 5(4) was to read them harmoniously with s 3(2) which allowed a person arrested under s 3(1) to be detained in police custody for up to 60 days pending the decision of the Minister under s 6(1). That being so, it could not be a breach of procedure for the IO to commence his investigation and for the Inquiry Officer to commence his Inquiry at any time within the 60-day period and for both the officers to submit their respective reports to the Minister at any time before the expiry of the 60-day detention period allowed by s 3(2). If the IO's investigation report and the Inquiry Officer's Inquiry report were submitted to the Minister before the 60-day period expired, and there was no breach of paras (a), (b) and (c) of s 3(2), there could be no valid complaint of procedural non-compliance on the part of either the IO or the Inquiry Officer. Any period of detention after the expiry of the 60-day detention period without a detention order being issued by the Minister under s 6(1) would be illegal (see paras 15–16 & 18–19).

(3) Since in the present case the IO had submitted his investigation report to the Inquiry Officer and to the Minister 36 days after the appellant's arrest and detention, it was within the 60-day detention period allowed by s 3(2) and therefore the appellant could not say that the IO had 'delayed' in submitting his investigation report. As it turned out, the detention order against the appellant under s 6(1) was issued on 27 April 2020, two days before the 60-day detention period under s 3(2) expired. Hence, the appellant's contention that there was procedural non-compliance as a result of 'delay' on the IO's part in submitting his investigation report was baseless (see paras 24–27 & 30).

(4) It was untenable for the appellant to challenge the legality or propriety of the investigation process carried out by the IO because whatever defect,

if any, in the investigation process carried out by the IO was irrelevant as it was superseded by the issuance of the detention order by the Minister on 27 April 2020. As decided by this court in *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393, an application for a writ of habeas corpus must be directed at the current or pre-existing detention of the arrested person and not in respect of a detention period that had expired or extinguished. By the time the appellant applied for the writ of habeas corpus, his detention under s 3(2) of the Act had expired and he was being detained under the Minister's order under s 6(1) (see paras 33–34).

(5) The Minister's detention order under s 6(1) was not an extension of the detention order issued by the police under s 3(2). The two were separate, distinct and unrelated. The legality of the detention under s 3(2) was not a condition precedent to the making of a detention order under s 6(1). The appellant, therefore, had to direct his challenge to his current detention under s 6(1) and not to the expired detention under s 3(2). He had to show procedural non-compliance by the deputy minister in issuing the s 6(1) detention order but that was not done (see paras 35–36).

(6) It was not a mandatory procedural requirement for the Advisory Board to accede to a request by the appellant to summon witnesses whom he wished to call at the representation hearing. As held by this court in *Lim Wen Jeng v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2009] 1 MLJ 445, where s 9 of the Emergency (Public Order and Prevention of Crime) Ordinance 5 of 1959 — which was almost identical word for word with s 12 of the Act — was considered, the Advisory Board could not be compelled to exercise its discretionary power to issue subpoenas applied for by the detainee. If the detainee wished to examine any witness, he had to make them available at the hearing and no obligation could be cast upon the Board to summon them (see paras 40–42).

[Bahasa Malaysia summary

Berdasarkan s 6(1) Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 ('Akta tersebut'), responden pertama memerintahkan perayu ditahan selama dua tahun di pusat pemulihan responden kedua. Perayu membuat permohonan untuk writ habeas corpus agar dibebaskan dari tahanan tetapi permohonan tersebut telah ditolak oleh Mahkamah Tinggi. Dalam rayuan semasa beliau terhadap keputusan tersebut, perayu mengemukakan dua alasan: (a) bahawa dia telah diprejudiskan dengan 'kelewatan' 36 hari dari pihak pegawai penyiasat polis ('IO') dalam menyerahkan laporan siasatannya kepada Pegawai Siasatan Kementerian Dalam Negeri dan kepada Menteri sebagaimana yang diperuntukkan oleh s 3(3) Akta tersebut; dan (b) bahawa penolakan oleh Lembaga Penasihat atas permintaannya untuk mengeluarkan

sepina bagi menjamin kehadiran saksi dalam perbicaraan representasi beliau telah menyebabkan ketidakadilan yang besar. Perayu telah ditangkap dan ditahan oleh polis di bawah s 3(1) Akta tersebut pada 1 Mac 2020. Tertakluk kepada syarat-syarat tertentu, s 3(2) membenarkannya ditahan selama 60 hari sekiranya tidak ada perintah penahanan di bawah s 6(1) telah dibuat terhadapnya. Perayu berpendapat bahawa IO telah menyerahkan laporan siasatannya kepada Pegawai Siasatan dan Menteri hanya pada 6 April 2020, iaitu, 36 hari selepas 1 Mac 2020 dan 'kelewatan' tersebut telah menyebabkan responden pertama 'melengahkan' dalam membuat perintah penahanannya di bawah s 6(1).

Diputuskan, sebulat suara menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Tidak ada apa-apa dalam Akta tersebut yang menetapkan jangka masa di mana IO perlu memulakan siasatannya setelah tahanan ditangkap di bawah s 3(1) dan bagi Pegawai Siasatan untuk memulakan Siasatannya di bawah s 5(2) setelah menerima laporan siasatan dari IO. Dan kedua-dua ss 3(3) dan 5(4) Akta tersebut mewajibkan pegawai masing-masing untuk menyerahkan laporan masing-masing ' dalam tempoh yang boleh ditetapkan oleh Menteri melalui peraturan-peraturan yang dibuat di bawah Akta ini'. Tetapi tidak ada tempoh yang ditetapkan oleh Menteri (lihat perenggan 13 & 16–17).

(2) Cara yang tepat untuk menafsirkan ss 3(3) dan 5(4) adalah membacanya secara harmoni dengan s 3(2) yang membenarkan seseorang yang ditahan di bawah s 3(1) ditahan dalam tahanan polis sehingga 60 hari sementara menunggu keputusan Menteri di bawah s 6(1). Oleh yang demikian, ia tidak menjadi pelanggaran prosedur bagi IO untuk memulakan penyiasatannya dan bagi Pegawai Siasatan untuk memulakan siasatannya pada bila-bila masa dalam tempoh 60 hari dan bagi kedua-dua pegawai untuk menyerahkan laporan masing-masing kepada Menteri pada bila-bila masa sebelum tamat tempoh penahanan 60 hari yang dibenarkan oleh s 3(2). Sekiranya laporan siasatan IO dan laporan Siasatan Pegawai Siasatan diserahkan kepada Menteri sebelum tempoh masa 60 hari berakhir, dan tidak ada pelanggaran perenggan (a), (b) dan (c) s 3(2), ada tidak ada aduan yang sah mengenai ketidakpatuhan prosedur baik oleh IO atau Pegawai Siasatan. Sebarang tempoh penahanan setelah berakhirnya tempoh penahanan 60 hari tanpa perintah penahanan dikeluarkan oleh Menteri di bawah s 6(1) adalah tidak sah (lihat perenggan 15–16 & 18–19).

(3) Oleh kerana dalam case semasa IO telah menyerahkan laporan siasatannya kepada Pegawai Siasatan dan Menteri 36 hari setelah penangkapan dan penahanan perayu, ia adalah dalam tempoh masa 60 hari penahanan yang dibenarkan oleh s 3(2) dan oleh itu perayu tidak

A boleh mengatakan bahawa IO telah 'lewat' dalam mengemukakan laporan siasatannya. Ternyata, perintah penahanan terhadap perayu di bawah s 6(1) dikeluarkan pada 27 April 2020, dua hari sebelum tempoh penahanan 60 hari di bawah s 3(2) berakhir. Oleh itu, pendapat perayu bahawa terdapat ketidakpatuhan prosedur akibat 'kelewatan' pihak IO B dalam menyerahkan laporan siasatannya adalah tidak berasas (lihat perenggan 24–27 & 30).

(4) Ia tidak dapat dipertahankan oleh perayu untuk mencabar kesahihan atau kesesuaian proses siasatan yang dilakukan oleh IO kerana sebarang C kecacatan, sekiranya ada, dalam proses siasatan yang dijalankan oleh IO adalah tidak relevan kerana ia telah digantikan oleh pengeluaran perintah penahanan oleh Menteri pada 27 April 2020. Seperti yang diputuskan oleh mahkamah ini dalam *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393, satu D permohonan untuk writ habeas corpus mesti ditujukan pada penahanan semasa atau yang sedia ada terhadap tahanan dan bukannya berkenaan dengan tempoh penahanan yang telah tamat atau berakhir. Pada masa perayu membuat permohonan writ habeas corpus, penahanannya di bawah s 3(2) Akta tersebit telah tamat dan beliau telah ditahan di bawah E perintah Menteri di bawah s 6(1) (lihat perenggan 33–34).

(5) Perintah penahanan Menteri di bawah s 6(1) bukanlah lanjutan perintah penahanan yang dikeluarkan oleh polis di bawah s 3(2). Kedua-duanya adalah berasingan, berbeza dan tidak berkaitan. Kesahan penahanan di F bawah s 3(2) bukanlah syarat duluan dalam pembuatan perintah penahanan di bawah s 6(1). Oleh itu, perayu harus mengarahkan cabarannya kepada penahanannya sekarang di bawah s 6(1) dan bukannya kepada penahanan yang telah tamat di bawah s 3(2). Beliau harus menunjukkan ketidakpatuhan prosedur oleh timbalan menteri G dalam mengeluarkan perintah penahanan s 6(1) tetapi ianya tidak dilakukan (lihat perenggan 35–36).

(6) Ia bukan merupakan syarat prosedur mandatori bagi Lembaga Penasihat untuk memenuhi permintaan perayu bagi memanggil saksi yang ingin dipanggil beliau dalam perbicaraan representasi. Seperti yang diputuskan H oleh mahkamah ini dalam *Lim Wen Jeng v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2009] 1 MLJ 445, di mana s 9 Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1959 — yang hampir sama pada setiap perkataan dengan s 12 Akta tersebut — telah dipertimbangkan, Lembaga Penasihat tidak dapat dipaksa untuk I menggunakan kuasa budi bicaranya untuk mengeluarkan sepina yang dimohon oleh tahanan. Sekiranya tahanan ingin memeriksa mana-mana saksi, beliau harus menyediakannya semasa perbicaraan dan tidak ada kewajiban yang dapat diletakkan kepada Lembaga untuk memanggil mereka (lihat perenggan 41–42).]

Cases referred to

Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors [2020] 1 MLJ 351; [2020] 1 CLJ 747, CA (refd)

Collins Nwanganga v Timbalan Menteri Dalam Negeri & 2 Lagi (Criminal Appeal No 05–251–10 of 2017(B), unreported) FC (refd)

Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors [2021] 5 MLJ 474; [2021] MLJU 1403; [2021] 1 LNS 994, FC (refd)

Kanageswaran a/l Siwarpikasam v Timbalan Menteri Dalam Negeri & 2 lagi (Criminal Appeal No 05–178–08 of 2017(B) (unreported), FC (refd)

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 81, FC (refd)

L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2018] Supp MLJ 393; [2010] 7 CLJ 653, FC (folld)

Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] MLJU 667; [2005] 3 CLJ 914, FC (refd)

Lim Wen Jeng v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2009] 1 MLJ 445; [2009] 1 CLJ 686, FC (folld)

Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors [2006] 1 MLJ 309; [2005] 4 CLJ 613, FC (folld)

Vishnu a/l Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 6 MLJ 1; [2019] 9 CLJ 177, FC (refd)

Legislation referred to

Dangerous Drugs (Special Measures) (Advisory Board Procedure) Rules 1987 rr 10, 102

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), (2), (2)(a), (2)(b), (2)(C), (3), 5(2), (4), 6(1), 11C(1), 12, 16, 22(2)(d)

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 9

Federal Constitution arts 5, 8, 151

Appeal from: Criminal Application No BA-44–246–07 of 2020 (High Court, Shah Alam)

N Sivanathan (Goh Cia Wee with him) (Sivanathan) for the appellant.

Muhammad bin Sinti (Farah Ezlin bt Yusop Khan with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Abdul Rahman Sebli FCJ (delivering judgment of the court):

THE DETENTION ORDER

[1] A detention order dated 27 April 2020 was issued by the Deputy Minister of Home Affairs ('the Deputy Minister') against the appellant under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'), ordering for the appellant to be detained at Pusat Pemulihan Akhlak Batu

Gajah, Perak for a period of two years with effect from the date of the detention order.

[2] The appellant applied to the High Court for a writ of habeas corpus to be issued for his release vide notice of motion dated 27 July 2020 supported by his affidavit affirmed on 16 July 2020. The application was dismissed by the learned judge on 7 December 2020 on the ground that there was no procedural impropriety in the detention of the appellant to warrant the grant of a writ of habeas corpus.

[3] Before us, the appellant raised the following two issues:

(a) there was a delay of 36 days by the police investigating officer in submitting the complete investigation report ('the investigation report') under s 3(3) of the Act to the inquiry officer of the Home Affairs Ministry and to the Deputy Minister of Home Affairs and this had prejudiced the appellant; and

(b) the appellant had been denied his right to a fair trial when the witnesses requested by the appellant were not brought before the Advisory Board, resulting in the evidence of these witnesses being not available during the appellant's representation hearing. According to the appellant this is contrary to ss 12 and 16 of the Act, r 102 of the Dangerous Drugs (Special Measures) (Advisory Board Procedure) Rules 1987 ('the Rules') as well as arts 151, 5 and 8 of the Federal Constitution.

First issue

[4] In her grounds of judgment, the learned trial judge dealt with the first issue in the following manner at paras [11]–[12]:

> [11] Alasan-alasan yang dikemukakan dalam afidavit Pegawai Penyiasat KDN di dalam afidavitnya boleh dikategorikan sebagai alasan- alasan yang memuaskan dan boleh diterima. Pegawai Penyiasat PDRM (Inspektor Yazid) juga di dalam afidavitnya memberi butiran secara terperinci antara waktu siasatan Pemohon dan penyediaan laporan kepada KDN (rujuk enclosure 9).
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> [12] Walaupun waktu penyediaan laporan mengambil masa untuk disediakan untuk pertimbangan TMDN yang akhirnya mengeluarkan perintah, waktu tersebut di dalam penahan remand yang sah (60 hari) yang sememangnya wujud untuk membolehkan siasatan yang telus dan menyeluruh.

[5] The appellant's contention was that the delay of 36 days by the investigating officer in submitting his investigation report to the Ministry's Inquiry Officer and to the Deputy Minister of Home Affairs under s 3(3) of the Act was unlawful as it was not done with 'all convenient speed'. The argument was that the delay had resulted in the delay by the Deputy Minister in issuing

the detention order under s 6(1) of the Act. A

[6] As to how the appellant came up with the 36-day delay, he measured it from the date he was detained under s 3(1) on 1 March 2020 to the date the investigating officer submitted his investigation report to the inquiry officer and to the Deputy Minister under s 3(3) on 6 April 2020. B

[7] Among the appellant's complaints was that his cautioned statement was only recorded ten days after his arrest and the statements of the witnesses were only recorded 17 days later. He said the statements should have been recorded before his arrest or at the very least immediately after his arrest. He did not however point out which provision of the Act that provides for such procedure. C

[8] The appellant drew support from the recent decision of this court in *Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors* [2020] 1 MLJ 351; [2020] 1 CLJ 747 where there was an alleged delay of 21 days by the inquiry officer in conducting the inquiry after receiving the investigation report from the investigating officer. It was pointed out that the delay of 36 days in the present case is 'far more severe' than the delay of 21 days in *Chua Kian Voon*. The issues that arose in that case were these: D E

(i) whether there was a failure on the part of the investigating officer to inform the appellant of the latter's right to make representation before the board;

(ii) whether there was a failure on the part of the respondents to inform the Secretary of the Board of the service of the detention order; F

(iii) whether the recorded statement bore no date;

(iv) whether the respondents had the right to withhold the recorded statement from the appellant; G

(v) whether there was a delay in conducting inquiry; and

(vi) whether the officer in charge of the centre delayed in reminding the appellant of his rights to make representations against his detention to the board. H

[9] The appellant picked out issue (v) as the relevant issue for purposes of this appeal, ie the delay of 21 days by the inquiry officer to conduct her inquiry after receiving the investigation report from the investigating officer, which the court held to be inordinate. The appellant quoted the whole of paras [64]–[70] of the judgment to shore up his argument that the delay of 36 days in the present case was inordinate and must be decided against the respondents. To provide context and to better appreciate the decision in *Chua Kian Voon*, we reproduce in full below paras [64]–[70] of the judgment which the appellant I

was relying on:

> [64] For clarity, the appeal before us did not concern the manner in which the inquiry was conducted as stipulated under s 5(3), but rather on *the time taken by the inquiry officer to conduct the inquiry against the appellant upon receiving the police investigation report on 25 October 2017*, as stipulated under s 5(2) of the 1985 Act.
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> [65] It is beyond argument that there is no provision in the 1985 Act that specifies the period within which the inquiry officer is required to conduct the inquiry. To the best of our knowledge, the Minister has yet to exercise his power under s 22(2)(d) of the 1985 Act which allows him to 'prescribe anything which may be prescribed under the Act' on this matter.
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> [66] The exercise of the Minister's discretionary power in prescribing the time period had been decided by the Supreme Court in *Lock Wee Kock* where the court held:
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> > It will be seen that Parliament has fixed the time periods under s 3(2) of the Act, but leaves it entirely to the Minister to fix the period within which the report is to be submitted under ss 3(3) and 5(4) of the Act. We are quite appreciative of the reasons why Parliament leaves it to the discretion of the minister to fix the period. The Minister has to take into consideration the amount of work and time which is taken up by the police and the inquiry officer to complete their investigation and inquiry. A simple and straight forward case may take a few days to complete, while a complicated one may take longer. If the Minister fixes a time period within which the police investigating officer is to submit his report under s. 3(3) or the inquiry officer under s 5(4) of the Act, that period may not be sufficient where the case will involve a lengthy investigation or inquiry and this may result in the reports not being complete in the sense that matters which ought to be investigated or inquired are left out. This will impose difficulty on the Minister to act under s 6(1) of the Act, when deciding to make or not to make the detention order.
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> > The time may come when the minister, through his experience in dealing with this matter, can positively assess what should be the time period within which the police investigating officer or the inquiry officer can certainly complete his report and, until the Minister can come to that conclusion, he should not fix the time by exercising his powers under ss 3(3) and 5(4) of the Act. We are of the view that for the reasons given, the words 'as may be prescribed by the Minister' found in both sections ought to be treated as conferring a power to prescribe, exercisable at his discretion, and not mandatory. The fact that no period has been prescribed by the Minister within which the reports are to be submitted by the investigating officer under s 3(3) or by the inquiry officer under s 5(4) of the Act does not vitiate the process leading to the detention order being made by the Minister.
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> [67] Section 5(4) of the 1985 Act allows the Minister to prescribe regulations stipulating time but as apparent from the above, the Minister has not done so. We then turned to s 54(2) of the Interpretation Acts 1948 and 1967 which stipulates that where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion

requires. Simply put, for any matter where time has not by law been prescribed, such matter ought to be completed as soon as practicable without inordinate delay.

[68] As the burden to prove the detention was lawful lies on the detaining authority, whether the report was completed with convenient speed or without inordinate delay remains a matter for the detaining authority ie, the respondents, to establish. It is trite that where there is delay on the part of the respondents to complete the report with 'convenient speed', it is incumbent upon the respondents to discharge the burden of proffering a satisfactory explanation for the delay. Thus, as we have alluded to earlier, if there is no explanation given, the court will assume that there are no reasons.

[69] We accordingly examined the evidence on record particularly the affidavits deposed by the inquiry officer, Nadia binti Mohd Izhar. We found none of her affidavits nor do any other affidavits from the respondents provide any credible reasons for the 21-day delay. The only reasons she gave in paras. 7 and 8 of her affidavit in reply dated 13 September 2018 were that she could only conduct physical examination on the appellant because she needed to read the file, examine the documents and the other subjects (witnesses). These, with respect, hardly constitute reasons because they are procedural matters which every other inquiry officer in her place would have to perform. The court cannot simply accede to the inquiry officer's pleas of heavy workload as a basis for the delay to conduct inquiry against the appellant under s 5(2) of the 1985 Act. If this plea were to be accepted, it would become a source of justification for prolonged and unacceptable delay in conducting the inquiry and this would impair the interest of the appellant.

[70] For the reasons aforementioned and in the absence of credible reasons for the delay, we had no option but to conclude that the 21-day delay in the time taken for the inquiry officer to conduct her inquiry against the appellant was inordinate and not with 'convenient speed'. This, to us was another reasons rendering the detention unlawful. (Emphasis added.)

[10] The first thing to note with regard to issue (v) is that it had nothing to do with the delay by the inquiry officer to submit her inquiry report to the Minister under s 5(4) of the Act. It was all about her failure to carry out her inquiry with 'convenient speed' after receiving the investigation report from the investigating officer. In other words, the complaint was that she did not conduct her inquiry soon enough after receiving the investigation report. The similarity with the case before us is that the investigating officer is alleged to have failed to carry out his investigation with all convenient speed after the appellant's arrest and detention in police custody on 1 March 2020, resulting in the delay in submitting his investigation report to the inquiry officer and to the Deputy Minister under s 3(3), which in turn resulted in the delay by the Deputy Minister to issue the detention order under s 6(1).

[11] Secondly and more importantly, it does appear from paras [64]–[70] of the judgment and indeed from a reading of the whole judgment that the court's attention was not drawn to s 3(2) of the Act, which allows for the person

arrested under s 3(1) to be detained in police custody for up to 60 days pending the decision of the Minister under s 6(1).

[12] That probably explains why there was no discussion by the court in *Chua Kian Voon* on the effect of s 3(2) when dealing with issue (v). Judging from the facts of the case as set out in para [4] of the judgment, it is clear that the inquiry officer had submitted her inquiry report to the Minister within the 60-day detention period allowed by s 3(2). The appellant was arrested on 21 September 2017 under s 3(1) and the inquiry officer submitted her inquiry report to the Minister under s 5(4) on 15 November 2017, six days before the expiry of the appellant's detention period of 60 days under s 3(2).

[13] There is nothing in the Act, and certainly not in s 3(3) and in s 5(4) that prescribes the time frame within which the investigating officer is to commence his investigation after the detainee's arrest under s 3(1) and for the inquiry officer to commence his inquiry under s 5(2) after receiving the investigation report from the investigating officer, but that seems to be the underlying argument articulated by the appellant in *Chua Kian Voon* which led the court into making the finding that the 21-day delay by the inquiry officer in conducting her inquiry after receiving the investigation report from the investigating officer was inordinate and was not carried out with all convenient speed.

[14] Apparently the court accepted the appellant's argument that his right to liberty was violated due to the alleged delay of 21 days by the inquiry officer in holding the inquiry. On the facts as disclosed by the inquiry officer in her affidavit in opposition, it is understandable why the court was not satisfied with her explanation as to why she only started to conduct her inquiry 21 days after receiving the investigation report from the investigating officer and not earlier. But the issue was not one of fact but essentially of law, ie whether the 21 days that she took before conducting her inquiry amounted to procedural non compliance of the law under which the appellant was detained.

[15] We are mindful that s 3(2) of the Act speaks of the detention of the detainee for a period of 60 days after his arrest under s 3(1) and not with the timeline within which the investigation and inquiry reports are to be submitted to the Minister under s 3(3) and s 5(4), but it stands to reason that if the arrested person is allowed to be detained in police custody for up to 60 days pending the decision of the Minister under s 6(1), it cannot be a breach of procedure for the investigating officer to commence his investigation and for the inquiry officer to commence his inquiry at any time within and before the expiry of the 60-day detention period allowed by s 3(2).

[16] What is procedurally important is for the investigation report and the

inquiry report to be submitted to the Minister before the expiry of the 60-day detention period. That done, there can be no valid complaint of procedural non compliance by the investigating officer or the inquiry officer. For comparison, ss 3(3) and 5(4) are reproduced below:

> Section 3(3)
>
> (3) The police officer making an investigation pertaining to a person arrested and detained under this section shall cause a copy of the complete report of the investigation to be submitted —
>
> (a) to an Inquiry Officer appointed under section 5(1); and
>
> (b) to the Minister, *within such period as may be prescribed by the Minister by regulations made under this Act*.
>
> Section 5(4)
>
> (4) An Inquiry Officer shall submit his report in writing to the Minister *within such period as may be prescribed by the Minister by regulations made under this Act*. (Emphasis added.)

[17] As can be seen, both sections require the respective officers to submit their respective reports to the Minister 'within such period as may be prescribed by the Minister by regulations made under this Act'. No such period has so far been prescribed by the Minister, but it will be absurd to suggest that the arrested person can be detained in police custody beyond the 60-day period allowed by s 3(2) without any detention order issued by the Minister under s 6(1). It is a canon of statutory interpretation that the interpretation must not lead to an absurdity, which will be the result if the two sections are to be interpreted in that manner.

[18] In our view, the proper way to construe s 3(3) and s 5(4) is to read them harmoniously with the preceding sub-s 3(2), which allows for the arrested person to be detained in police custody for a period of not more than 60 days after his arrest under s 3(1). In other words, whatever may be the time that the investigating officer may take to complete his investigation and whatever may be the time that the inquiry officer may take to complete his inquiry, they must submit their respective reports to the Minister under ss 3(3) and 5(4) before the expiry of the 60-day detention period allowed by s 3(2). Sections 3(1) and 3(2) are couched in the following language:

> (1) Any police officer may, without warrant, arrest and detain, for the purpose of investigation, any person in respect of whom he has reason to believe there are grounds which could justify his detention under subsection 6(1).
>
> (2) Any person arrested and detained under this section may be detained in police custody for *a period not exceeding sixty days* without an order of detention having been made in respect of him under subsection 6(1):

A (3) Provided that —

(a) he shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of Inspector;

B (b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;

(c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf and the Inspector General or police officer so designated by him, as the case may be, shall forthwith report the same to the Minister. (Emphasis added.)

D **[19]** The provisions of s 3(2) are clear and unambiguous. There is therefore no necessity to lift the legislative veil so to speak to find out what Parliament's intention was in enacting the provision. It means that any person arrested under s 3(1) may be detained in police custody for the purpose of investigation E for a period of up to 60 days 'without an order of detention having been made in respect of him under subsection 6(1)' provided there was no breach of paras (a), (b) and (c) which is not the case in the present appeal. Any period of detention after the expiry of the 60-day detention period without the detention order being issued by the Minister under s 6(1) would be illegal.

F **[20]** Thus, reading ss 3(3) and 5(4) in tandem with s 3(2), the investigating officer and the inquiry officer have 60 days to complete their investigation and inquiry before submitting their reports to the Minister under ss 3(3) and 5(4). There is therefore a timeline within which the reports under ss 3(3) and 5(4) G are to be submitted to the Minister, although the Minister has yet to prescribe the period within which the investigating officer and the inquiry officer are to do so in exercise of his power under s 22(2)(d) of the Act.

[21] As to how the investigating officer and the inquiry officer are to utilise H the 60 days that they have to carry out the investigation (in the case of the investigating officer) and to carry out the inquiry (in the case of the inquiry officer), that must depend on the facts and exigencies of each case, but between them they must not take more than 60 days to do so. The Act does not prescribe a step by step procedure which they are required to follow in carrying out their I investigation and inquiry. That, if at all, is a matter for their respective departments to lay down internally.

[22] After the investigation and inquiry reports have been submitted to the Minister under ss 3(3) and 5(4) by the Investigating and Inquiry officers, the

next procedural requirement is for the Minister to act under s 6(1), which provides as follows:

> 6(1) Wherever the Minister, after considering —
>
> (a) the complete report of investigation submitted under subsection 3(3); and
>
> (b) the report of the inquiry officer submitted under subsection 5(4),
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of the public order such person be detained, by order (hereinafter referred to as a 'detention order') direct such person be detained for a period not exceeding two years.

[23] For the purpose of exercising his power under s 6(1), the Minister must have both the investigation report by the investigating officer and the inquiry report by the inquiry officer. Obviously these reports must be submitted to him before the expiry of the 60-day detention period under s 3(2), for otherwise, as we said, the continued detention of the arrested person in police custody would be illegal. The following short chronology of events is important:

(a) the appellant was detained under s 3(2) on 1 March 2020; and

(b) the investigation report was submitted by the investigating officer to the inquiry officer and to the Deputy Minister under s 3(3) on 6 April 2020, ie 36 days after the appellant's arrest and detention.

[24] As the appellant's detention under s 3(2) was effective from 1 March 2020 and the investigating officer submitted his investigation report to the inquiry officer and to the Deputy Minister under s 3(3) on 6 April 2020, that would add up to 36 days that he took to complete his investigation.

[25] By simple arithmetic calculation, the 36 days that the investigating officer took to complete his investigation was less than the 60 days that the appellant was allowed to be detained in police custody under s 3(2). That being the case, it cannot be correct to say that there was a delay of 36 days by the investigating officer in submitting his investigation report to the inquiry officer and to the Deputy Minister under s 3(3), much less to have caused a delay in the issuance of the detention order by the Deputy Minister under s 6(1).

[26] The 60-day detention period under s 3(2) expired on 29 April 2020 but the whole process, from the time of the appellant's detention in police custody under s 3(2) on 1 March 2020 up until the time the Deputy Minister issued the detention order under s 6(1) on 27 April 2020, was completed a clear two days before the expiry of the detention period of 60 days on 29 April 2020.

[27] If the period of detention allowed by s 3(2) is 60 days, then the investigating officer had in fact submitted his report earlier by 24 days (60 days minus 36 days) and the detention order was issued by the Minister earlier by two days (60 days minus 58 days). Therefore, the appellant's contention that there was a 36-day delay by the investigating officer to submit his investigation report to the inquiry officer and to the Deputy Minister resulting in the delay by the Deputy Minister to issue the detention order under s 6(1) is factually baseless.

[28] There would have been a delay if the investigating officer had submitted his investigation report to the inquiry officer and the Deputy Minister outside the 60-day period under s 3(2). Here, the investigation report was submitted to the inquiry officer and to the Deputy Minister within 36 days after the appellant's detention under s 3(2) on 1 March 2020 even though technically the investigating officer had 60 days to do so.

Judicial review

[29] As for the appellant's entitlement to relief against the detention order issued by the Minister under s 6(1) of the Act, s 11C(1) of the same Act is relevant and provides as follows:

> 11C Judicial review of act or decision of Yang di-Pertuan Agong and Minister
>
> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or finding or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

[30] The terms of the section are clear, that the decision of the Minister to make the detention order under s 6(1) of the Act is not amenable to judicial review except for procedural non compliance. Having regard to the fact that the investigation report was duly submitted to the inquiry officer and to the Deputy Minister before the expiry of the appellant's detention period under s 3(2), we are unable to see how it can be said that there was procedural non compliance by the investigating officer in submitting his investigation report 36 days after the appellant's arrest and detention on 1 March a 2020 that warrants the grant of a writ of habeas corpus in favour of the appellant.

[31] As the term implies, procedural non compliance means failure to abide by the procedural rules laid down by the governing statute, in this case the Act. The following observations by this court in *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] MLJU 667; [2005] 3 CLJ 914 at pp 930–931, albeit made in relation to amendments made to the relevant statute, are on point:

In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So, in a *habeas corpus* application where the detention order of the Minister made under s 4(1) of the Ordinance or, for that matter, the equivalent ss. in the ISA 1960 and DD(SPM) Act 1985, the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non- compliance thereof and only then the courts should consider whether, on the facts, there has been non-compliance.

[32] Further to that, it has been held by this court in *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393; [2010] 7 CLJ 653 that any irregularity for non compliance with the procedure prescribed by s 3(2)(a), (2)(b) and (2)(C) of the Act is not a relevant matter for consideration when it has been superseded by the Minister's detention order under s 6(1). The reason is because any question on the legality or propriety of the arrest or detention of a detainee at the investigation stage is not a relevant consideration, nor is it a precondition for the Minister to make the detention order. This is what the court said at paras [9]–[11]:

[9] The cases referred to above illustrate the principles upon which the courts will consider in allowing for judicial review on an executive detention order. It may be stated this way. A writ of *habeas corpus* must be directed only against the current detention order even if the earlier arrest of the detainee is irregular. The court is also not concerned with the vagueness, sufficiency or relevancy of the grounds of detention which is the sphere of the subjective exercise of the Minister's discretion under the various executive detention legislations unless *mala fide* on his part is shown (see *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 1 LNS 65 see also *Minister of Home Affairs, Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29). Any questions on the legality or propriety of the arrest or detention of a detainee at the investigation stage is not a relevant consideration nor is it a pre-condition to the order of detention of the Minister.

[10] Only when the statute requires an act to be a condition precedent to the making of a detention order can a valid complaint be made against that detention. Under the Act there are two conditions precedent for the Minister to consider before making a detention order. These are found in s 6(1) of the Act ...

[11] The scheme under the Act (similarly under the POPOC) is that before a detention order is directed, the police would need to conduct an investigation which includes the power to detain any suspected persons. The manner on conducting the investigations and arrests at this stage, is neither a condition precedent nor a matter which has a direct link with the detention order and thus not a ground for judicial review. Previous cases such as *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor* [1987] 1 LNS 67, which held that a detention order made against a suspect who had been illegally detained by the police at the

investigation stage is subject to judicial review are no longer good law since this is not a procedural non-compliance of a condition precedent to nullify the detention order (see also the Federal Court case of *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] MLJU 667; [2005] 3 CLJ 914).

[33] That is exactly what the present appeal is all about, which is a challenge by the appellant on the legality or propriety of the investigation process carried out by the investigating officer. This is untenable as whatever defect, if any, in the investigation process carried out by the investigating officer has been superseded by the issuance of the detention order by the Minister on 27 April 2020 and is therefore irrelevant. As decided in *L Rajanderan*, any application for the issuance of a writ of habeas corpus must be directed at the current or pre-existing detention of the arrested person and not after the expiry or extinguishment of his detention period: see also *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 which was followed recently by this court in *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors [2021] 5 MLJ 474* [2021] MLJU 1403; [2021] 1 LNS 994.

[34] In the present case, the appellant's notice of motion applying for the writ of habeas corpus was dated 27 July 2020 and the learned High Court judge delivered her decision on 7 December 2020. By that date, the appellant was no longer being detained under s 3(2) but detained pursuant to the order of the Deputy Minister under s 6(1) since 27 April 2020. Clearly the time for the appellant to apply for a writ of habeas corpus against the legality of his detention under s 3(2) had long expired by the time he filed the application on 27 July 2020.

[35] It must be remembered that the detention order issued by the Minister under s 6(1) is not an extension of the detention order issued by the police under s 3(2). They are two separate, distinct and unrelated orders, one in the exercise of police power and the other in the exercise of the Minister's power. The Minister is not involved in the detention of the detainee under s 3(2) in as much as the police are not involved in the detention of the detainee under s 6(1). The legality of the detention under s 3(2) is not a condition precedent to the making of a detention order under s 6(1): *L Rajanderan* and *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613.

[36] We must emphasise, at the risk of being repetitive, that following the ratio in *L Rajanderan* and *Mohd Faizal Haris*, the appellant must direct his challenge to the current detention under s 6(1) and not to his detention under s 3(2), which had expired. Hence, for the appellant to succeed in his application for habeas corpus in the present case, it must be shown that there was procedural non compliance by the Deputy Minister in issuing the

detention order under s 6(1). There is no evidence of such procedural non compliance by the Deputy Minister. We therefore reject the appellant's contention that the delay by the investigating officer in submitting his investigation report to the inquiry officer and to the Deputy Minister under s 3(3) had led to a delay in the issuance of the detention order under s 6(1) by the Deputy Minister. It is clear that the detention order was issued by the Deputy Minister within the period of the appellant's lawful detention under s 3(2) of the Act. In the circumstances, we find the first issue to be without merit.

Second issue

[37] The appellant's complaint in relation to the second issue is that he was denied a fair hearing when the witnesses requested by the appellant were not brought before the Advisory Board, resulting in the evidence of these witnesses being not made available during the appellant's representation hearing. The argument took a slightly different turn at the hearing of this appeal when it was argued that the Advisory Board's refusal to issue the subpoenas *ad testificandum* that the appellant applied for had caused grave injustice to the appellant. According to the appellant, he was not demanding for the Advisory Board to secure the attendance of the witnesses but merely asking the Board to issue the subpoenas so that he could serve them on the witnesses whom he intended to call at his representation hearing.

[38] Section 12 of the Act which empowers the Advisory Board to summon witnesses provides as follows:

> 12 Power to summon witnesses
>
> Every Advisory Board shall, for the purposes of this Act, but subject to section 14, have all the powers of a court for the summoning and examination of witnesses, the administration of oaths or affirmations, and for compelling the production of documents.

[39] This provision is to be read together with r 10 of the Dangerous Drugs (Special Measures) (Advisory Board Procedure) Rules 1987 which provides:

> 10(1) Subject to the provisions of the Act and these Rules, where any matter is not expressly provided for by these Rules, the Board may regulate its own procedure.
>
> (2) In particular, but without prejudice to the generality of paragraph (1), the Board may, having regard to considerations of security, in its discretion determine —
>
> (a) whether the evidence of any witness should be heard in the presence of a detained person or his representative or both;
>
> (b) whether any police officer should be required to appear before the Board in the presence of a detained person or his representative, or both; and

A (c) where any document or other information should be made available or disclosed to a detained person of his representative, or both.'

B **[40]** In *Lim Wen Jeng v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2009] 1 MLJ 445; [2009] 1 CLJ 686 this court was called upon to consider s 9 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Emergency Ordinance') which reads:

C Every Advisory Board shall, for the purposes of this Ordinance, but subject to the provisions of section 11, have all the powers of a Court for the summoning and examination of witnesses, the administration of oaths or affirmations, and for compelling the production of documents.

D **[41]** The provision is almost identical word for word with s 12 of the Act. It was held that the Advisory Board cannot be compelled to exercise its discretionary power to issue the subpoenas applied for by the appellant. As for the reasons why, we can do no better than to reproduce what the court said at paras [11]–[12] of the judgment:

E [11] In the present case, s 9 of the Ordinance is quite clear in its provision. I agree with the learned judge that the section is an empowering provision which, subject to disclosure under s 11 of facts or production of documents which are against the national interest to disclose or produce (see also art 151(3) of the Constitution), confers powers on the board to summon witnesses and compel the production of documents. By its terms, s 9 (unlike r 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 which requires service of certain number of copies of Form 1 as ruled in Puvaneswaran, supra, as a mandatory requirement), is not a mandatory procedural requirement that the board can be compelled to exercise the power of summoning the witnesses as required by the appellant. If the appellant wishes to examine any witnesses he should make them available at the hearing and no obligation can be cast on the board to summon them.

F

G [12] The Board, like any other tribunal is free to regulate its own procedure within the constraints of the Federal Constitution and the statute. It was open to it in the exercise of that power to limit the time within which the appellant must complete his evidence. That was because the Board was under an obligation pursuant to s 9 of the Ordinance to submit its report to the Yang di Pertuan Agong within three months from the date of receipt of the appellant's representations. The proceedings before the Board has to be completed expeditiously. Thus, the reason of too short a notice given by the Secretary of the Board for not invoking s 9 was justified.

H

I **[42]** Learned counsel for the appellant however argued that *Lim Weng Jeng* is distinguishable on the facts as in that case the appellant failed to state specifically what was the evidence that the two witnesses whom he wished to call would testify before the Board whereas in the present case the appellant had done so. We are not persuaded by the argument as the ratio decidendi of the case is clear, that under s 9 of the Emergency Ordinance, which is similar not

only in form but in substance with s 12 of the Act, it is not a mandatory procedural requirement for the Advisory Board to accede to a request by the detainee to summon witnesses whom he wishes to call at the representation hearing. We have no reason to depart from the decision in that case.

[43] We were referred by Datuk N Sivanathan to two decisions of this court in *Kanageswaran a/l Siwarpikasam v Timbalan Menteri Dalam Negeri & 2 lagi* Criminal Appeal No 05–178–08 of 2017(B) and *Collins Nwanganga v Timbalan Menteri Dalam Negeri & 2 Lagi* Criminal Appeal No 05–251–10 of 2017(B), which according to learned counsel this court allowed both appeals on the ground that the Advisory Board's refusal to exercise its power to summon the witnesses on application by the appellants was a wrong exercise of discretion.

[44] It is unfortunate that we do not have the benefit of the written grounds of judgment in the two cases. Without the grounds, it is impossible to know exactly why this court allowed the habeas corpus applications by the two appellants in the two cases, not that we do not believe what learned counsel was telling us from the Bar table.

[45] In *Vishnu a/l Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 1; [2019] 9 CLJ 177 this court observed as follows at para [40]:

> [40] The respondents argued that the Federal Court there had heard a similar argument on this point and refused the detainee a writ of habeas corpus. As at the date of our decision in this appeal, no written grounds had been delivered in respect of that case and so we are therefore unable to glean any reasons why such a decision was made. Therefore, we did not see how the said judgment lent any support to the respondent's case. Surely, in arriving at our decision, we had to consider and apply the law according to the facts and circumstances of this case.

CONCLUSION

[46] For all the reasons aforesaid, the appeal is dismissed and the decision of the High Court is affirmed.

Appeal dismissed.

Reported by Ashok Kumar